

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA**

WHITEWOOD, *et al.*,

Plaintiffs,

v.

CORBETT, *et al.*,

Defendants.

Civil Action

No. 13-1861-JEJ

**PLAINTIFFS' BRIEF IN OPPOSITION TO THE
MOTION TO DISMISS OF DEFENDANT KATHLEEN KANE**

INTRODUCTION

Defendant Attorney General Kathleen Kane (the “Attorney General”) filed a motion to dismiss, contending that she is not a proper defendant in this case pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). As discussed below, the Attorney General’s enforcement powers with respect to the challenged statutes are sufficient to meet the “case or controversy” requirement of Article III, Section 2 of the United States Constitution. Accordingly, the Attorney General’s Motion should be denied.

ARGUMENT

I. THE ATTORNEY GENERAL IS A PROPER PARTY TO THIS ACTION.

The Attorney General is a proper party to this action seeking declaratory and prospective injunctive relief under 42 U.S.C. § 1983. Plaintiffs hereby incorporate by reference the legal discussion in part II of the Argument section of Plaintiffs’ Brief in Opposition to the Motion to Dismiss of Defendants Thomas W. Corbett and Michael Wolf.¹

¹ The Attorney General frames the issue of whether she is a proper party in terms of Article III standing, and in particular, whether Plaintiffs’ injuries from 23 Pa. C.S. §§ 1102 and 1704 are “‘fairly traceable’ to the defendant's conduct”. (Atty. Gen. Br. at 4 (quoting *Planned Parenthood of Cent. New Jersey v. Farmer*, 220 F.3d 127, 146 (3d Cir. 2000).) The Governor frames the argument in the context of the Eleventh Amendment. The analyses, however, are functionally the same. (See Plaintiffs’ Brief in Opposition to the Motion to Dismiss by Thomas W.

(continued...)

Regarding the Attorney General's powers in particular, she has the legal authority for enforcement of 23 Pa. C.S. §§ 1102 and 1704. She is the "chief law enforcer" pursuant to the Pennsylvania Constitution, art. IV, § 4, and she has the power to bring both civil and criminal actions to compel compliance with Commonwealth laws including 23 Pa. C.S. §§ 1102 and 1704. *See* 71 P.S. § 732-204(c); 71 P.S. § 732-205(a)(6).

Here, as in *Planned Parenthood of Cent. New Jersey v. Farmer*, 220 F.3d 127, 146 (3d Cir. 2000), the Attorney General properly is named as a defendant in her official capacity due to her enforcement responsibilities with respect to the challenged statutes. *See Planned Parenthood of Cent. New Jersey v. Verniero*, 41 F. Supp. 2d 478, 482 (D.N.J. 1998) (noting the Attorney General of New Jersey was a named defendant in his official capacity because he was "responsible for enforcement of the Act" and remained as a party to the action despite "declin[ing] to defend the Act"), *aff'd sub nom. Planned Parenthood of Cent. New Jersey v. Farmer*, 220 F.3d 127.

(continued...)

Corbett and Secretary Wolf, at 8 n.6.) In fact, both the Governor's Brief and the Attorney General's Brief rely significantly upon *Ist Westco Corp. v. School District of Philadelphia*, 6 F.3d 108 (3d Cir. 1993), which, as Plaintiffs demonstrated in opposition to the Governor's Motion, is not supportive of the dismissal of either the Governor or Attorney General here.

The Attorney General has stated publicly her agreement with Plaintiffs' position that 23 Pa. C.S. §§ 1102 and 1704 are unconstitutional and that she will not defend the law against Plaintiffs' constitutional attack. However, while Plaintiffs do not in anyway minimize the importance and significance of the Attorney General's position, the challenged statutes unfortunately remain the law of Pennsylvania. Those statutes are enforced and will continue to be enforced against Plaintiffs and other same-sex couples through a myriad of ways as summarized in the Complaint. And until Plaintiffs obtain declaratory and injunctive relief against those charged by law to enforce it, Plaintiffs will continue to suffer.

Although the Attorney General has stated that she will not defend Pa. C.S. §§ 1102 and 1704, she also has stated publicly since this suit that she still will enforce the statutes. She articulated the distinction of defense of the statutes versus enforcement of the statutes as follows:²

I will enforce the laws of the Commonwealth, but I cannot defend the Governor and the Secretary in a lawsuit where I have a fundamental difference of opinion as to the constitutionality of the DOMA statute. . . .

² As discussed in Plaintiffs' response to the Motion to Dismiss of Defendants Corbett and Wolf, consideration of evidence outside the pleadings is appropriate in resolving a motion to dismiss for lack of subject matter jurisdiction. (*See* Plaintiffs' Brief in Opposition to the Motion to Dismiss by Thomas W. Corbett and Secretary Wolf, at 12, n.8.)

Let me give you an example of the difference between defending the clients and enforcing the laws of Pennsylvania. We also, in our office, we prosecute and we handle tax appeals. So for example, if a same sex couple files an appeal on taxes that they had to pay because there is a . . . statutory prohibition against same sex marriage in Pennsylvania, then that case would come to our office. It would be my responsibility to continue to enforce the tax codes of Pennsylvania until such time as they are changed.

Radio Times (WHYY radio broadcast Jul. 16, 2013), at 7:30-7:44, 8:31-9:11, available at <http://whyy.org/cms/radiotimes/2013/07/16/same-sex-marriage-in-pennsylvania/>.³

In summary, because there is a “real, not ephemeral, likelihood or realistic potential that the [the Attorney General’s enforcement powers] will be employed against the plaintiff’s interests,” *1st Westco Corp. v. School Dist. Of Phila.*, 6 F.3d 108, 114 (3d Cir. 1993) (quoting *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988)) and because the enforcement of the statutes are “fairly traceable” to the Attorney General and she has stated that she will enforce the statutes until they are

³ Since this July 16, 2013 statement, the Attorney General did decline to enforce 23 Pa. C.S. §§ 1102 and 1704 against the Montgomery County Register of Wills and authorized the Governor’s Office of General Counsel to bring an enforcement action against him. The delegation of authority to enforce in that case did not divest the Attorney General of her enforcement powers generally with respect to 23 Pa. C.S. §§ 1102 and 1704. At this time, Plaintiffs do not understand the Attorney General to be taking a different position than what she stated on *Radio Times*. Accordingly, there remains a likelihood of enforcement by the Attorney General that is sufficient to meet the “case or controversy” requirement of Article III.

declared unconstitutional by a Court, she remains a proper defendant for declaratory and prospective injunctive relief under 42 U.S.C. § 1983.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Attorney General's motion to dismiss. Alternatively, Plaintiffs should be granted leave to amend their Complaint.

Respectfully submitted,

Dated: October 21, 2013

HANGLEY ARONCHICK SEGAL
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2013, I caused the foregoing Plaintiffs' Brief in Opposition to the Motion to Dismiss of Defendant Kathleen Kane to be filed electronically using the Court's electronic filing system, and that the filing is available to counsel for all parties for downloading and viewing from the electronic filing system.

/s/ Mark A. Aronchick
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